85 - 1774

No.:_____

Supreme Court, U.S.
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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

In the Matter of

WARREN M. LEVIN, M.D.,

Petitioner,

- against -

C. MEYNARD GUEST, M.D., as Executive Secretary of the State Board for Professional Medical Conduct of the State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Of Counsel

QUESTIONS PRESENTED

1. Whether petitioner's due process rights under the Fourteenth Amendment were violated where petitioner's motion to quash an office subpoena duces tecum issued by the State Board for Professional Medical Conduct of the State of New York requiring production of his confidential physician-patient records was denied on the basis of an *in camera* review by the Court and particularly where the subpoena is silent as to the purpose of the investigation, any alleged charges or complaints against the physician and as to the relevancy of the records sought?

2. Is due process of law violated by an *in camera* review of materials offered to substantiate the issuance of an office subpoena duces tecum by the State Board for Professional Medical Conduct of the State of New York pursuant to New York State Public

QUESTIONS PRESENTED

Health Law § 230 subd. 10(a)(k) and (l) absent a prior showing of "the delicacy of a particular investigation or the risk of and consequences attendant on premature disclosure"?

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No.:_____

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C. MEYNARD GUEST, M.D., as Executive Secretary of the State Board for Professional Medical Conduct of the State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner Warren M. Levin, M.D. respectfully prays that a writ of

certiorari issue to review the decision of the Court of Appeals of the State of New York entered on January 14, 1986 and the opinion of the New York State Supreme Court, Appellate Division, First Department entered on August 5, 1985.

OPINIONS BELOW

The decision of the Court of Appeals of the State of New York appears in the Appendix beginning at page 1a. The opinion of the New York State Supreme Court, Appellate Division, First Department appears in the Appendix beginning at page 3a. The opinion of the Supreme Court, New York County (A. Klein, J.), appears in the Appendix beginning at page 12a.

JURISDICTION

The decision of the Court of Appeals of the State of New York was entered on

January 14, 1986. This petition for a writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS

Section 230 of the Public Health Law of the State of New York, Subdivisions (a)(k) and (l) states as follows:

* * *

§230. State Board for professional medical conduct; proceedings

10. Professional misconduct proceedings shall consist of:

(a) Investigation. The board for professional medical conduct, by a committee on professional conduct, may investigate on its own any suspected professional misconduct, and shall investigate each complaint received regardless of the source. The results of the investigation shall be referred to the director of the office of professional medical conduct. If the director of the office of professional medical conduct, after consultation with a professional member of the board for professional medical conduct, determines

that a hearing is warranted he shall direct counsel to prepare the charges within fifteen days thereafter. If it is determined by the director that the complaint involves a question of professional expertise then such director may seek, and if so shall obtain, the concurrence of at least two members of a panel of three members of the State Board for Professional Medical Conduct. If there is a question of alcoholism, alcohol abuse, drug abuse or mental illness, the director may refer the matter to a special panel of three members of the state board which, to the extent possible, shall be comprised of members who have experience in the treatment of alcoholism, alcohol abuse, drug abuse or mental illness. The director may seek the concurrence of at least two members of the special panel as to professional misconduct proceedings, pursuant to this subdivision, and referral to a physician committee, as referred to in subparagraph (ii) of paragraph (c) of subdivision eleven of this section.

* * * * *

* * * * * * *

(k) The executive secretary of the board with the specific approval of a committee on professional conduct of the board shall have the power to issue subpoenas requiring persons to appear before the board and be examined with reference to a matter within the scope of the inquiry or the investigation being conducted by the board and produce books, papers, records or documents pertaining thereto.

(l) The board or its representatives may examine and obtain records of patients in any investigation or proceeding by the board acting within the scope of its authorization. Unless expressly waived by the patient, any information so obtained shall be confidential and shall not be disclosed except to the extent necessary for the proper function of the board and New York State Board of Regents and the name of the patient may not be disclosed by the board or its employees at any stage of the proceedings unless the patient has expressly consented. Any other use or dissemination by any person by any means, unless pursuant to a valid court order or otherwise provided by law, is prohibited.

* * * * * *

STATEMENT OF THE CASE

On September 15, 1980 the New York State Board for Professional Medical Conduct issued an office subpoena duces tecum to petitioner, Warren M. Levin, M.D., calling for the production of certain patient records. The subpoena requested "Any and all records, documents or other writings pertaining to Donald McDougall, Florence McDougall and Mrs. Jean Kaufman." Said subpoena was purportedly based on a complaint of another physician received by the Board four years earlier in October 1976.

Thereafter petitioner moved to quash the subpoena duces tecum in Supreme Court, New York County and the Board cross-moved to compel enforcement. By decision dated June 15, 1981 that Court granted the motion to quash. The Board appealed and the Appellate Division, First Department reversed on the law and

granted the motion to comply. Petitioner appealed to the Court of Appeals which reversed and reinstated the Supreme Court's original order to quash. Levin v. Murawski, 59 N.Y.2d 35.

A second virtually identical subpoena dated August 29, 1983 but still based on the 1976 omplaint was then issued calling for petitioner to produce, "Your records relating to your patient: a. Donald McDougall, b. Florence McDougall, c. Jean Kaufman or copies of such records certified to be complete and accurate." Petitioner's counsel requested by letter to the Board sufficient details of the complaint and the complainant as well as the relevancy of the materials subpoenaed. This request was denied. Petitioner again moved to quash the subpoena and the Board cross-moved to compel compliance. The affidavits submitted by the Board in support of its cross-motion

failed to contain any information constituting a "minimal threshold showing that the complaint is authentic and that it is of sufficient substance to warrant investigation" as required to sustain the subpoena under the original Levin v. Murawski decision.

The Board, however, offered to the Court in camera and over counsel's objections confidential materials alleged to support the issuance of the subpoena. By decision dated December 28, 1983 the Court, after taking and reviewing the materials, which to this day are unknown to petitioner, quashed the subpoena. The Board again appealed and offered in camera to the Appellate Division, First Department, this time without notice to petitioner, materials alleged to support the issuance of the subpoena. Thus the petitioner cannot state whether the materials shown to

the Appellate Division were the same as those shown to the Supreme Court.

The Appellate Division again reversed and the petitioner again appealed to the Court of Appeals which affirmed the Appellate Division without opinion, in a decision dated January 14, 1986. It is from that decision and order that this petition is taken.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted because this case involves a question of recurring significance and is of sufficient importance since it touches the due process rights of this physician petitioner as well as untold other physicians throughout the State of New York and other sovereign states.

In this particular case a complaint was received over nine years ago, and to this day the petitioner has not been informed of who his accuser is, the nature of the accusation and the relevancy of the materials requested.

In the initial case on virtually the identical subpoena, the Court of Appeals, Levin v. Murawski, 59 N.Y.2d 35, reversed the Appellate Division, First Department and quashed the subpoena. The Court stated that Public Health Law §230 subd. (10) requires a "minimal

threshold showing that the complaint is authentic and it is of sufficient substance to warrant investigation." The subpoena in question failed to establish such minimal threshold foundation. Citing Matter of A'Hearn v. Committee on Unlawful Practice of Law of N.Y. County Lawyers' Association, 23 N.Y.2d at 918, the Court further stated that, "There must be authority, relevancy and some basis for inquisitional action."

This case brings before the Court the identical subpoena that still fails, on its face and in the affidavits supporting the motion to compel compliance, to set forth a justifiable basis for a good faith investigation. The Board, however, in violation of petitioners due process rights offered to the lower Court in camera certain materials which it claimed justified

the issuance of the office subpoena duces tecum. Despite written demands from petitioner's counsel the Board refused to disclose to petitioner the nature of the complaint, the complainant and the relevancy of the documents sought. In an effort to circumvent petitioner's right to know his accuser and the nature of the accusation, the Board attempted to expand the very narrow corridor in which in camera showings are allowed. Levin, supra at pg. 43; Matter of Sussman v. New York State Organized Crime Task Force, 39 N.Y.2d 227, 233.

It must be emphasized that these records in question in this case are the physician-petitioner's confidential patient records and there has never been a showing that this nine year old investigation (which the Board concedes is based solely on and consists of the

1976 letter of complaint by another physician) is one of those "instances, perhaps few in number, in which the delicacy of the particular investigation or the risk of and consequences attendant on premature disclosure may be such that it will be appropriate to employ specially limited, in camera,...procedures..." Matter of Sussman v. New York State Organized Crime Task Force, supra at pg. 233.

The Court of Appeals misapplied its own mandate and, as such, has let open the floodgates for office subpoenas duces tecum that may well later be found to have no legitimate basis for their issuance. These subpoenas do and will effect the rights of all physicians as well as the confidentiality of their patients' records. Due process requires that the physician be notified of the nature of the complaint and the

relevancy of the documents sought at the earliest stage of an investigation that uses as a tool an office subpoena duces tecum so that the physician can formulate a meaningful response with full consideration for all his rights. This petitioner, to this very day, does not know the factual basis upon which the office subpoena duces tecum was upheld. He is now required to disclose confidential patient records without the slightest idea of the ramifications of such disclosure, and without having had the opportunity to contest the information submitted by the Board to the Court in camera. This petitioner does not even know whether the information submitted to the Appellate Division is the same as that submitted to the Supreme Court which quashed the subpoena. Such a procedure flies in the face of the general guarantee of

procedural fairness which must be granted at a "meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187.

Petitioner's most valuable property right, his license to practice medicine, is the ultimate interest at stake and, as such, cannot be the subject of closed door determinations. Schwartzberg v. Califano, 480 F. Supp. 569.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A
Decision of the Court of Appeals

COURT OF APPEALS OF THE STATE OF NEW YORK

No. 109 - October Term, 1985

Decided: January 14, 1986

In the Matter of WARREN M. LEVIN, M.D.,

Appellant,

- against -

C. MEYNARD GUEST, M.D., & c.,

Respondent.

Appendix A
Decision of the Court of Appeals

On review of submissions pursuant to Section 500.4 of the Rules, order affirmed, with costs, for the reasons stated in the memorandum at the Appellate Division. Motion by American Academy of Medical Preventics for leave to file a brief amicus curiae denied.

Chief Judge Wachtler and Judges Meyer, Simons, Kaye, Alexander and Titone concur. Judge Hancock took no part.

Appendix B
Opinion of the Appellate Division
First Department

Kupferman, J.P., Ross, Asch, Bloom,

Rosenberger, JJ.

23735N In re WARREN M. LEVIN, M.D.,

Petitioner-Respondent

- against -

C. MEYNARD GUEST, M.D., etc.,

Respondent-Appellant.

- - - - - - - - -

Association of American Physicians & Surgeons, Inc.,

Amicus Curiae

Order of the Supreme Court, New York County (A. Klein, J.), entered February 29, 1984, which granted petitioner's motion to quash a subpoena duces tecum and denied respondent's cross-motion to enforce said subpoena, is reversed on the law and facts, without costs or disbursements, and the motion by petitioner denied and respondent's cross-motion granted.

Appendix B
Opinion of the Appellate Division
First Department

The respondent Board received a report setting forth allegations of professional misconduct by the petitioner physician. After an initial investigation by an agent of the Board, the results of the investigation were presented to a panel of the Board, which directed that a subpoena be issued for petitioner's patient records for three named patients.

On September 15, 1980, a subpoena duces tecum was issued which called for the production of the following:

> Any and all records, documents or other writing pertaining to Donald McDougall, Florence McDougall and Mrs. Jean Kaufman.

The subpoena was silent as to the purpose of the investigation, any alleged charges or complaints against petitioner, the relevancy of the records sought, and the authority pursuant to which it was issued.

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Opinion of the Appellate Division
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Petitioner physician moved to quash the subpoena duces tecum and respondent Board cross-moved to compel compliance. Special Term granted the motion to quash and denied the cross-motion to compel compliance. On appeal to this Court, the decision of Special Term was reversed (Matter of Levin v. Murawski, 88 AD2d 529). The Court of Appeals reversed and reinstated the order of the Supreme Court (Levin v. Murawski, 59 NY2d 35).

After the Court of Appeals decision, the respondent Board issued another, virtually identical subpoena, which forms the basis of this appeal. That subpoena, dated August 29, 1983, commanded petitioner to produce:

> Your records relating to your patients:
>
> A) Donald McDougall
> B) Florence McDougall
> C) Jean Kaufman

Once again the subpoena was silent as

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Opinion of the Appellate Division
First Department

to the purpose of the investigation, any alleged charges or complaints against petitioner, the relevancy of the records sought, and the authority pursuant to which it was issued. Petitioner Levin moved to quash the subpoena and respondent Board cross-moved to compel compliance.

In support of its cross-motion to enforce the subpoena, the respondent Board stated that the Board, charged with the duty of investigating charges of professional misconduct by physicians, received a complaint "alleging professional misconduct by Warren M. Levin, M.D. with respect to the medical assistance rendered by him to [the three individuals named in the subpoena]." After a preliminary investigation by an investigator of the Board, the

Appendix B
Opinion of the Appellate Division
First Department

matter was reviewed by a panel of the Board which authorized the issuance of the subpoena herein. In authorizing the subpoena the panel had before it, and considered, certain "sensitive informa-ation which was obtained from a source which the department is mandated by statute to keep confidential." Because of that statutory mandate, the Board declined to make public specific information in the affidavits submitted in opposition to the motion to quash or in support of the cross-motion to compel compliance. However, the Board offered "in camera" the material constituting the "confidential letter of complaint," the preliminary report by its investigator and other material.

After reviewing the in camera material, Special Term granted petitioner's motion

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Opinion of the Appellate Division
First Department

to quash the subpoena and denied respondent's cross-motion to enforce the subpoena, finding that "the State Board has failed to make a threshold demonstration of the authenticity of the complaint to justify the issuance of the subpoena."

Upon our review of the confidential material, we disagree with the conclusion of Special Term and find that it establishes a minimum threshold foundation justifying the issuance of a subpoena by the respondent. The complaints are sufficient to rule that there is enough substance to warrant further investigation.

In order to enforce the office subpoena duces tecum issued herein, the respondent Board is required to make a minimum threshold showing that the complaint is authentic and that it is of

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sufficient substance to warrant investigation (Matter of Levin v. Murawski, supra, at 38). Respondent, rather than divulge the purpose of the investigation and the alleged charges to the petitioner, attempted to demonstrate, through "in camera" material submitted to Special Term, that the allegations were made by a bona fide complainant and verified by an agent of respondent. Respondent claims that if it is required to disclose the facts underlying the complaints at this early stage, an important source of information will dry up. If the names of the complainants are made known to the petitioner, especially at the early investigational stage, the complainants may be subject to various types of harassment, including lawsuits, however groundless. Moreover, Public Health Law,

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§ 230, subd 11 (a), mandates that reports of professional misconduct be kept confidential. In addition, premature discovery of the sort demanded by the petitioner could lead to destruction or sanitizing of the records sought by the agency when the subject of the investigation becomes aware of the specific purpose for which the agency seeks to examine the subpoenaed records.

As stated by the Court of Appeals:

> "If the issuing agency demonstrates the delicacy of a particular investigation or the risk of and consequences attendant on premature disclosure, it may be appropriate to take proof of the threshold foundation in camera. (See, Matter of Sussman v. New York State Organized Crime Task Force, 39 NY2d 227, 233)." (Matter of Levin v. Murawski, supra, p 42, n 4).

Since the Board was under a duty to maintain the confidentiality of reports

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of misconduct it received pursuant to the Public Health Law, § 230, subd 11(a), this was precisely the type of situation to which an in camera proceeding should apply.

All concur.

Order filed.

Appendix C
Opinion of the Supreme Court
New York County
(Klein, A., Justice)

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

----------x

In the Matter of

WARREN M. LEVIN, M.D., INDEX NO. 25084/83

Petitioner, CAL. NO. 159
CAL. DATE 12/15/83

- against -

C. MAYNARD GUEST, M.D., as Executive Secretary of the State Board for Professional Medical Conduct of the State of New York,

Respondent.

----------x

KLEIN, ALVIN F., J.:

This is an application for an order (CPLR 2304) quashing a subpoena duces tecum issued by the State Board of Professional Medical Conduct and served upon Dr. Warren M. Levin on or about September 12, 1983.

Respondent cross-moves for an order dismissing the motion to quash the

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New York County
(Klein, A., Justice)

subpoena duces tecum and granting the cross-motion to enforce the subpoena duces tecum (CPLR 2308[b]).

This matter has been before this Court once before. The Supreme Court, New York County granted a motion to quash a prior subpoena duces tecum. The Appellate Division, First Department reversed (88 AD2d 529) and the Court of Appeals reversed the Appellate Division in Levin v. Murawski, 59 NY2d 35 (1983).

The subpoena served upon Dr. Levin in September 1983 is substantially the same as that served upon him in September 1980.

It must be noted that on September 22, 1983, the Attorney for petitioner sent a letter to Elizabeth Lang, Deputy Counsel for the New York State Department of Health, Office of Professional Medical Conduct re-

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(Klein, A., Justice)

questing that she be furnished with any charges or complaints that have been filed against Dr. Levin and the nature of such complaints (see Petitioner's Exhibit 1).

By letter dated September 23, 1983, Ms. Lang informed petitioner's attorney that she declined to modify or withdraw said subpoena and declined to furnish petitioner's attorney with a copy of any charges or complaints that have been filed against Dr. Levin.

In Matter of Levin v. Murawski, 59 NY2d 35, the Court said at p 38

> To sustain a subpoena issued on behalf of the State Board of Professional Medical Conduct for production of Medical records in aid of an investigation of an individual physician when the investigation has been triggered by receipt of a third-party complaint, there must be a minimal threshold showing that the complaint is authentic and that it is of sufficient substance to warrant investigation.

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(Klein, A., Justice)

In Footnote 4 of the aforesaid Levin case, the Court said

> If the issuing agency demonstrates the delicacy of a particular investigation or the risk of and consequences attendant on premature disclosure, it may be appropriate to take proof of the threshold foundation in camera (see Matter of Sussman v. New York State Organized Crime Task Force, 39 NY2d 227, 233).

Respondent, on page 3 of its brief, states

> The Board is submitting, in camera, for this Court's consideration, confidential materials which, it feels, constitute prima facie proof of a justifiable basis for a good faith investigation of professional misconduct and reasonably justify the issuance of the subpoena duces tecum.
>
> Under the circumstances, therefore, this Court's decision after reading the in camera material will be dispositive of the threshold showing required by the Court of Appeals.

The Court has carefully reviewed the data submitted to it in camera. The alleged "confidential materials" are not

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New York County
(Klein, A., Justice)

such as falling within the purview of either Levin or Sussman. Here, there is no "delicacy of the particular investigation or the risk of and consequences attendant on premature disclosure" necessitating in camera procedure by the court "to make the necessary judicial determination" (Sussman, p 233).

This is not a case involving "organized crime activities" or one of the "instances, perhaps few in number" which required this court's in camera inspection of the data submitted by the Board. (Sussman, p 233.)

The Court finds that the State Board has failed to make a threshold demonstration of the authenticity of the complaint to justify the issuance of the subpoena herein.

Appendix C
Opinion of the Supreme Court
New York County
(Klein, A., Justice)

Accordingly, the subpoena is quashed, and the cross-motion is denied.

Settle order.

Dated: December 28th, 1983

A.F.K.
J.S.C.